Yoong Sze Fatt v Pengkalen Securities Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–398 OF 2006
LOW HOP BING, HELILIAH AND ABDUL MALIK ISHAK JJCA
11 FEBRUARY 2009

Civil Procedure — Appeal — Interference by appellate court — Circumstances where appellate intervention warranted — Whether trial court had so fundamentally misdirected itself

Civil Procedure — Trial — Submission of no case to answer — No evidence led by defendant — Whether all evidence led by plaintiff must be assumed to be correct — Whether adverse inference to be drawn against defendant under s 114(g) of the Evidence Act 1950

Contract — Shares, sale of — Contra losses — Validity of transactions — Share trading account opened by defendant through third party — Shares purchased by remisier on behalf of defendant upon instructions of third party — Whether defendant liable for losses — Whether defendant estopped from denying knowledge and validity of transactions

Evidence — Adverse inference — Failure to lead evidence — Submission of no case to answer — Whether adverse inference could be drawn against defendant — Evidence Act 1950 s 114(g)

Evidence — Expert evidence — Handwriting — Effect of failure to call expert — Handwriting expert passed away — Whether specimen signatures mentioned in report incapable of independent verification — Whether report admissible as evidence

Securities — Shares — Sale and purchase — Claim for contra losses — Whether defendant had knowledge of transaction — Share trading account opened by defendant through third party — Shares purchased by remisier on behalf of defendant upon instructions of third party — Whether defendant liable for losses — Whether defendant estopped from denying knowledge and validity of transactions

The plaintiff/respondent was a stock broking company. The first

defendant/appellant was the plaintiff's client who had through his employer, one Dato' Wong opened a trading account with the plaintiff ('the account'). Pursuant to cl 6 of the agreement between the plaintiff and first defendant, the first defendant undertook to pay for shares purchased on his behalf. The plaintiff purchased 602,000 shares for the first defendant under the account pursuant to the instructions given by the first defendant's employer on the first defendant's behalf to the plaintiff's remisier ('PW2'). The contract notes and contra statements were sent by the plaintiff to the first defendant's home address provided by the first defendant in his application for the opening of the account. The first defendant had never asserted that the purchase was not his transaction and did not respond to the plaintiff's letter of demand. Transactions conducted on the account had led to an overall loss on the said account. The first defendant now contended that he had never instructed anyone to purchase the shares. At the close of the plaintiff's case, the first defendant submitted that the he had no case to answer and elected not to adduce any evidence. However, the first defendant produced a purported handwriting expert's report and tendered through his counsel to prove the first defendant's contention that he did not sign the account opening form. The High Court allowed the plaintiff's claim and hence this appeal.

Held, dismissing the appeal with costs:

(1) (per **Low Hop Bing JCA**) It is trite law that once a defendant in civil proceedings makes a submission of no case to answer and elects not to call evidence, then all the evidence led by the plaintiff must be assumed to be correct (see para 5).

(2) (per **Low Hop Bing JCA**) While there was no evidence of the first defendant personally instructing PW2 to trade in the shares, there was evidence that the first defendant's employer had on behalf of the first defendant instructed PW2 to purchase the shares. This attracted the application of cl 6 of the agreement (see para 19).

(3) (per **Low Hop Bing JCA**) If the first defendant had nothing to do with the account or the trading of the shares by his employer through the account, the first defendant as a reasonable man should have at the earliest opportunity raised a complaint or query in relation to the contract notes, contra statements and letter of demand sent to his home address. He had not done so. It was now too late to deny liability and his conduct called for the application of the doctrine of estoppel (see para 21).

(4) (per **Abdul Malik Ishak JCA**) Having failed to protest to the transactions or usage of his account, the first defendant must now be estopped from denying the losses arising from the trades conducted on

his trading account. Parties to litigation who have continued the proceedings with knowledge of an irregularity of which they might have availed themselves were definitely estopped from afterwards setting it up (see para 37).

(5) (per **Abdul Malik Ishak JCA**) When a submission of no case to answer has been made and coupled with the submission that no witnesses will be called, it gives rise to the unrebuttable implications that: (a) the outcome to the question of whether there is a case to answer would be that all evidence led by the plaintiff must be presumed to be correct; and (b) the burden falls on the first defendant to call evidence to rebut the plaintiff's case and the first defendant's failure to do so in the absence of reasonable explanation will trigger an adverse inference to be drawn against the first defendant under s 114(g) of the Evidence Act 1950 ('Act') (see para 46).

(6) (per **Abdul Malik Ishak JCA**) Since the evidence led by the plaintiff must be presumed to be true, the plaintiff had therefore satisfied the requirements under s 101 of the Act. It therefore fell on the first defendant to prove his defence under s 101. The first defendant too had to introduce such evidence as was necessary to discharge that burden under ss 102 and 103 of the Act. The first defendant's failure to call evidence resulted in an appropriate adverse inference to be drawn against him (see para 47).

(7) (per **Abdul Malik Ishak JCA**) The handwriting 'expert' had passed away prior to the trial. Thus, in the absence of direct evidence from the 'expert' his report could not be admissible as evidence. The sample or specimen signatures mentioned in the 'expert' report were also incapable of independent verification. The High Court had correctly disregarded the 'expert' report (see para 61).

(8) (per **Abdul Malik Ishak JCA**) The appellate court is under a duty to intervene with the finding of facts by the trial court where the trial court has so fundamentally misdirected itself that a reasonable man may safely say that no reasonable court which had properly directed itself and asked the right questions would have arrived at the same conclusion. In the present appeal, there were no reasons to intervene or interfere with the finding of facts arrived at by the High Court (see paras 64 & 66).

[Bahasa Malaysia summary

Plaintif/responden adalah sebuah syarikat saham. Defendan pertama/perayu merupakan pelanggan plaintif yang telah membuka akaun dagangan dengan plaintif ('akaun tersebut') melalui majikannya, Dato' Wong. Menurut klausa 6 perjanjian di antara plaintif dan defendan pertama, defendan pertama telah

mengaku janji untuk membayar saham yang telah dibeli bagi pihaknya. Plaintif telah membeli 602,000 saham bagi pihak defendan pertama di bawah akaun tersebut mengikut arahan yang diberikan oleh majikan defendan pertama bagi pihak defendan pertama kepada remisier plaintif ('PW2'). Nota-nota kontrak dan kenyataan-kenyataan kontra telah dihantar oleh plaintif ke alamat rumah defendan pertama yang diberikan oleh defendan pertama dalam permohonannya untuk membuka akaun tersebut. Defendan pertama tidak pernah menegaskan bahawa pembelian tersebut bukan transaksinya dan tidak menjawab surat tuntutan plaintif. Transaksi yang dilakukan ke atas akaun tersebut membawa kepada kerugian keseluruhan ke atas akaun tersebut. Kini defendan pertama menegaskan bahawa dia tidak pernah mengarah sesiapa untuk membeli saham tersebut. Pada penutupan kes plaintif, defendan pertama menghujah bahawa dia tiada kes untuk dijawab dan memilih untuk tidak mengemukakan apa-apa keterangan. Walau bagaimanapun, defendan pertama telah mengemukakan laporan pakar tulisan tangan dan menender melalui peguamnya bagi membuktikan hujah defendan pertama bahawa dia tidak menandatangani borang membuka akaun. Mahkamah Tinggi membenarkan tuntutan plaintif dan justeru itu rayuan ini.

Diputuskan, menolak rayuan dengan kos:

(1) (oleh **Low Hop Bing HMR**) Adalah undang-undang tetap bahawa setelah defendan dalam prosiding sivil membuat penghujahan tentang tiada kes untuk dijawab dan memilih untuk tidak memberi keterangan, maka semua keterangan yang dikemukakan oleh plaintif hendaklah dianggap betul (lihat perenggan 5).

(2) (oleh **Low Hop Bing HMR**) Tidak ada keterangan bahawa defendan pertama sendiri mengarahkan PW2 untuk berdagang dalam saham tersebut tetapi pada masa yang sama terdapat keterangan bahawa majikan defendan pertama bagi pihak defendan pertama telah mengarahkan PW2 untuk membeli saham tersebut. Ini telah menarik pemakaian klausa 6 perjanjian (lihat perenggan 19).

(3) (oleh **Low Hop Bing HMR**) Jika defendan pertama tidak mempunyai kaitan dengan akaun mahupun dagangan saham tersebut oleh majikannya melalui akaun tersebut, defendan pertama sebagai seorang yang munasabah sepatutnya pada peluang terawal lagi telah membuat aduan atau siasatan berkenaan nota-nota kontrak, kenyataan-kenyataan kontra dan surat tuntutan yang telah dihantar ke alamat rumahnya. Namun dia tidak berbuat sedemikian. Sekarang sudah terlewat untuk menafikan liabiliti dan perlakuannya memerlukan pemakaian doktrin estopel (lihat perenggan 21).

A (4) (oleh **Abdul Malik Ishak HMR**) Setelah gagal membantah terhadap transaksi-transaksi atau penggunaan akaunnya, defendan pertama kini perlu diestopkan daripada menafikan kerugian akibat daripada dagangan yang dilakukan ke atas akaun dagangannya. Pihak-pihak dalam litigasi ini yang meneruskan prosiding dengan pengetahuan B tentang luar aturan yang mereka sendiri mungkin bergantung tentunya diestop daripada menggunakannya kemudian (lihat perenggan 37).

(5) (oleh **Abdul Malik Ishak HMR**) Apabila penghujahan tentang tiada kes untuk dijawab telah dibuat bersama dengan penghujahan bahawa tiada saksi akan dipanggil, ia menimbulkan implikasi yang tidak boleh C dipatahkan bahawa: (a) hasil untuk soalan sama ada terdapat kes untuk dijawab adalah bahawa semua keterangan yang dikemukakan oleh plaintif hendaklah dianggap betul; dan (b) beban terletak ke atas defendan pertama untuk memberi keterangan bagi mematahkan kes plaintif dan kegagalan defendan pertama untuk berbuat demikian D dengan ketiadaan penjelasan munasabah akan mencetuskan inferens bertentangan yang dibuat terhadap defendan pertama di bawah s 114(g) Akta Keterangan 1950 ('Akta') (lihat perenggan 46).

(6) (oleh **Abdul Malik Ishak HMR**) Memandangkan keterangan yang E dikemukakan oleh plaintif hendaklah dianggap benar, plaintif dengan itu telah memenuhi keperluan-keperluan di bawah s 101 Akta. Dengan itu ia terletak ke atas defendan pertama untuk membuktikan pembelaannya di bawah s 101. Defendan pertama juga perlu mengemukakan keterangan sebegini kerana ia perlu melepaskan beban F di bawah ss 102 dan 103 Akta. Kegagalan defendan pertama untuk memberi keterangan membawa kepada inferens bertentangan yang sewajarnya dibuat terhadapnya (lihat perenggan 47).

(7) (oleh **Abdul Malik Ishak HMR**) 'Pakar' tulisan tangan tersebut telah G meninggal dunia sebelum perbicaraan. Oleh itu, dalam ketiadaan keterangan langsung daripada 'pakar' tersebut laporannya tidak boleh diterima sebagai keterangan. Contoh atau spesimen tandatangan-tandatangan yang disebutkan dalam laporan 'pakar' itu juga tidak dapat ditentusahkan secara berasingan. Mahkamah Tinggi H telah sewajarnya menolak laporan 'pakar' tersebut (lihat perenggan 61).

(8) (oleh **Abdul Malik Ishak HMR**) Mahkamah rayuan mempunyai kewajipan untuk campur tangan dengan penemuan fakta oleh mahkamah perbicaraan jika mahkamah perbicaraan itu telah salah arah pada dasarnya sehingga seorang yang munasabah boleh mengatakan I bahawa tiada mahkamah yang munasabah yang dengan betul telah mengarahkan sewajarnya dan bertanyakan soalan yang sewajarnya akan mencapai kesimpulan yang sama. Dalam rayuan ini, tiada sebab untuk mengganggu atau campur tangan dengan penemuan fakta yang diputuskan oleh Mahkamah Tinggi (lihat perenggan 64 & 66).]

Notes

For a case on contra losses, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 5053.

For cases on adverse inference in general, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 125–234.

For cases on handwriting, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1465–1473.

For cases on interference by appellate court, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1042–1065.

For cases on sale and purchase, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 951–966.

For cases on submission of no case to answer, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 7888–7893.

Cases referred to

Alexander v Rayson [1936] 1 KB 169, CA (refd)

Alfred Ernest Derrick (1910) 5 Cr App R 162 (refd)

Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals [2003] 1 MLJ 567; [2003] 2 AMR 6; [2003] 1 CLJ 585, CA (refd)

Asean Security Paper Mills Sdn Bhd v CGU Insurance Bhd [2007] 2 CLJ 1, FC (refd)

Associated Tractors Sdn Bhd v Woo Sai Wa [1997] 5 MLJ 441, HC (refd)

Benham Ltd v Kythira Investments Ltd & Anor [2003] EWCA Civ 1794, CA (Civ Div) (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Boyce v Wyatt Engineering & Ors [2001] EWCA Civ 692, CA (refd)

Burgoyne & Co Ld and PB Burgoyne v AH Godfree & Co (1904) 22 RPC 168, CA (refd)

Chai Then Song v Malayan United Finance Bhd [1993] MLJU 128; [1993] 2 CLJ 640, HC (refd)

Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai [1997] 3 MLJ 61, FC (refd)

Dunn v Shanks [1932] NI 66, CA (refd)

Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor [1989] 1 MLJ 35, SC (refd)

Else v Barnard (1860) 28 Beav 228 (refd)

EON Bank Bhd v Hotel Flamingo and another case [2005] 1 MLJ 712, HC (refd)

Fortunatus Edmund Andrews v John Elliott (1855) 5 El & Bl 502 (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 6 AMR 781; [2004] 4 CLJ 309, FC (refd)

Gwyther v Boslymon Quarries Ltd [1950] 2 KB 59; [1950] 1 All ER 384 (refd)

Heller Factoring Sdn Bhd (previously known as Matang Factoring Sdn Bhd) v Metalco Industries (M) Sdn Bhd [1995] 2 MLJ 153; [1995] 2 AMR 1353, CA (refd)
Herman v Royal Exchange Shipping Co and Patton, Jr & Co (1884) C & E 413 (refd)
Hopgood v Brown [1955] 1 All ER 550; [1955] 1 WLR 213, CA (refd)
Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693, SC (refd)
Jackson v Knutsford Urban District Council [1914] 2 Ch 686 (refd)
Lai Yong Koon v PP [1962] MLJ 327, HC (refd)
Len Min Kong v United Malayan Banking Corp Bhd and another appeal [1998] 2 MLJ 478; [1998] 3 AMR 2641; [1998] 2 CLJ 879, CA (refd)
Lim Chor Ching & Anor v Idris bin Abdul Karim and anor appeal [1998] 3 AMR 3182; [1998] 3 CLJ Supp 145, HC (refd)
Loo Hon Kong v Loo Kim Lim @ Loo Kim Leong [2004] 4 AMR 591; [2004] 4 CLJ 1, CA (refd)
Maju Holdings Sdn Bhd v Fortune Wealth (H-K) Ltd and other appeals [2004] 4 MLJ 105; [2004] 6 AMR 319; [2004] 4 CLJ 282, CA (refd)
Miller (t/a Waterloo Plant) v Cawley [2002] EWCA Civ 1100, CA (refd)
Murarilal v State of MP AIR 1980 SC 531 (refd)
Oakland Metal Co Ltd v D Benaim & Co Ltd [1953] 2 QB 261; [1953] 2 All ER 650 (refd)
PP v Yiau Swee Tung [1999] 3 MLJ 353, HC (refd)
Peyman v Lanjani & Ors [1985] 1 Ch 457; [1984] 3 All ER 703, CA (refd)
Queen, The v Silverlock [1894] 2 QB 766 (refd)
RHB-Cathay Securities Pte Ltd v Ibrahim Khan & other actions [1999] 3 SLR 464, HC (refd)
Renal Link (KL) Sdn Bhd v Dato' Dr Harnam Singh [1997] 2 MLJ 373; [1997] 3 AMR 2430, CA (refd)
Sarawak Securities Sdn Bhd v Andy Chan Chiaw Guan; Fabian Eh Ng (third party) [2000] 7 CLJ 364, HC (refd)
Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd [2006] 3 MLJ 131; [2006] 3 AMR 410; [2006] 2 CLJ 337, CA (refd)
Shrager v Basil Dighton Ltd & Ors [1924] 1 KB 274, CA (refd)
Sim Ah Song & Anor v Rex [1951] MLJ 150, HC (refd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (refd)
Subry bin Hamid v Husaini bin Tan Sri Ikhwan & Anor [2006] 6 MLJ 229, CA (refd)
Teh Poh Wah v Seremban Securities Sdn Bhd [1996] 1 MLJ 701, CA (refd)
Thomas v Brown (1875–76) 1 QBD 714 (refd)
Thomas Tyerman v Sarah Smith (1856) 6 El & Bl 719 (refd)
Toronto Railway Co v Corp of the City of Toronto [1904] AC 809, PC (refd)
Wasakah Singh v Bachan Singh (1931) 1 MC 125 (refd)
Whitehouse v Jordan & Anor [1981] 1 WLR 246, HL (refd)

Wisniewski v Central Manchester Health Authority [1998] Lloyd's Rep Med 223, CA (refd)
Wright v John Bagnall & Sons Ltd [1900] 2 QB 240, CA (refd)
Yorkshire Insurance Company Ltd & Ors v Craine [1922] 2 AC 541, PC (refd)

Legislation referred to

Evidence Act 1950 ss 51, 60(1)(d), 73, 101, 102, 103, 114(g)

Tharmaiden Singh (Wong Guo Lun with him) (Vazeer Akbar Majid & Co) for the appellant.
Sulaiman bin Abdullah (Stanley S Sinnappen with him) (Izral Partnership) for the respondent.

Low Hop Bing JCA:

APPEAL

[1] This appeal by the appellant ('the defendant') is directed against the decision of the learned High Court judge who had allowed the respondent's ('the plaintiff's') claim for the sum of RM2,927,621.70 with interest against the defendant, and dismissed the defendant's counterclaim for RM2m, with costs (collectively 'the entire judgment').

[2] On 23 January 2009, we dismissed the appeal and affirmed the entire judgment of the court below. Our grounds now follow.

SUBMISSION OF NO CASE TO ANSWER

[3] The first issue, raised by plaintiff's learned counsel Mr Tharmaiden Singh (Mr Wong Guo Lun with him), is a question of law. It concerns the legal implications of the defendant's submission of no case to answer, coupled with the intention not to call witnesses. It was submitted that, in the circumstances, all evidence adduced in the plaintiff's case must be presumed to be correct, on the basis of *Wasakah Singh v Bachan Singh* (1931) 1 MC 125; *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 (SC); and *Subry bin Hamid v Husaini bin Tan Sri Ikhwan & Anor* [2006] 6 MLJ 229 (CA).

[4] Defendant's learned counsel, Sulaiman bin Abdullah (assisted by Mr Stanley S Sinnappen) offered no response to the above submission.

[5] In our judgment, it is trite law that once a defendant in civil proceedings makes a submission of no case to answer and elects not to call evidence, then all the evidence led by the plaintiff must be assumed to be correct: per Gopal Sri Ram JCA in *Jaafar bin Shaari*, at p 712, citing *Wasakah Singh*. This principle has found similar expression in a number of judgments handed down in the motherland of common law. These cases include *Alexander v Rayson* [1936] 1 KB 169; *Boyce v Wyatt Engineering & Ors* [2001] EWCA Civ 692; *Miller (t/a Waterloo Plant) v Cawley* [2002] EWCA Civ 1100; and *Benham Ltd v Kythira Investments Ltd & Anor* [2003] EWCA Civ 1794 (CA).

[6] With this principle uppermost in our mind, we proceeded to consider the evidence led by the plaintiff in the court below, which culminated in the finding of facts.

FINDING OF FACTS

[7] After a full trial, the court below arrived at a finding of facts which may be unfolded below.

[8] The plaintiff is a stockbroking company and a member of the Kuala Lumpur Stock Exchange ('KLSE'), now Bursa Malaysia. The defendant was the plaintiff's client who had through his employer one Dato' Wong Yeon Chai opened trading account No 273077 with the plaintiff ('the account') in which the defendant had placed a sum of RM2m for the purpose of trading in shares and securities (collectively 'the shares').

[9] The defendant's employer is not an appellant herein. The trading of the shares pursuant to the account is subject to the terms and conditions contained in the agreement which was brought into existence ('the agreement') vide the defendant's application for the account. It is also subject to the rules and regulations of the KLSE.

[10] The material terms and conditions thereof, inter alia, are to the following effect:

(a) the defendant undertakes to make immediate payment for delivery of the shares purchased on his behalf (cl 6);

(b) the defendant authorises the plaintiff to sell or buy shares and undertakes to indemnify the plaintiff against all losses in such events (cl 9);

(c) the defendant agrees to pay all charges and interest rates imposed by the plaintiff at the plaintiff's discretion (cl 11);

(d) the defendant authorises the plaintiff to debit the account for the purchase of shares (cl 15); and

(e) all orders made through the phone shall not be revoked or withdrawn and shall be confirmed by the defendant.

[11] It is the plaintiff's practice to record the client's instructions to purchase shares on a manual 'business done' slip which is then passed on to the plaintiff's back room staff who would then key into the system the confirmation of the instructions.

[12] The plaintiff had, on 19 November 1997, purchased 602,000 shares for the defendant under the account pursuant to the instructions given by the defendant's employer on the defendant's behalf to the plaintiff's remisier ('PW2').

[13] When the defendant received the contract notes and contra statements sent by the plaintiff to the defendant's home address provided by the defendant in his application for the opening of the account, in relation to the aforesaid purchase of shares, the defendant had not raised any protest or query with the plaintiff. He had not complained to the plaintiff that he had never allowed his employer to utilise the account.

[14] At all material time prior to the plaintiff's commencement of the action against him in the High Court, the defendant had chosen to remain silent in relation to the contract notes and contra statements which were sent to him. He had never asserted that the purchase was not his transaction, nor had he responded to the plaintiff's letter of demand dated 28 November 1997 which was also sent to him at his home address.

[15] At the close of plaintiff's case, the defendant submitted that the he had no case to answer, and elected not to adduce any evidence.

SHARE PURCHASE

[16] The defendant's contention is that the defendant had never instructed the plaintiff, the plaintiff's remisier or any third party to purchase the shares pursuant to the defendant's account, and so the plaintiff has failed to prove its claim against the defendant and that the defendant has in turn established the counterclaim against the plaintiff.

[17] The plaintiff argued that the defendants' pleaded position was one of unsubstantiated denial.

[18] In our judgment, the terms and conditions, contained in the agreement which the defendant and the plaintiff had brought into existence consequent upon the defendant's application to the plaintiff to open the account with the deposit of RM2m to enable him to trade in shares listed on the KLSE, are legally binding on the parties vis the defendant and the plaintiff herein: *Sarawak Securities Sdn Bhd v Andy Chan Chiaw Guan; Fabian Eh Ng (third party)* [2000] 7 CLJ 364 (HC).

[19] While it is true that there was no evidence of the defendant personally instructing the plaintiff's remisier to trade in the shares, there was indeed undisputed evidence that the defendant's employer had on behalf of the defendant instructed the plaintiff's remisier ('PW2') to purchase the shares pursuant to the account. The purchase of the shares had been transacted by the defendant's employer on behalf of the defendant. This would attract the application of cl 6 of the agreement.

[20] After having received the contract notes and contra statements from the plaintiff, the defendant had never protested nor queried the plaintiff thereon. There was also no complaint by the defendant that he had not allowed his employer to utilise the account. He was completely oblivious to the plaintiff's letter of demand. The defendant's conduct or absence of response speaks volumes against the defendant. The silence, indeed the omission, by the defendant in this regard is deafening.

[21] In our judgment, if the defendant had really nothing to do with the account or the trading of the shares by his employer through the account, which is flushed with an enormous amount of RM2m, the defendant as a reasonable man would no doubt have at the earliest opportunity raised a complaint, protest or query with the plaintiff in relation to the contract notes, contra statements and letter of demand sent to his home address. He had not done so. It is now too late in the day to deny liability after the commencement of the suit, a fortiori, in this appeal. The defendant's conduct certainly calls for the application of the doctrine of estoppel.

[22] In *Teh Poh Wah v Seremban Securities Sdn Bhd* [1996] 1 MLJ 701 (CA), the wife who had helped her husband to trade in shares vide the husband's contract with Seremban Securities Sdn Bhd, despite the Mareva injunction against the husband, by signing all the cheques in her cheque book, had her defence and counterclaim struck out. The Court of Appeal through the judgment of Gopal Sri Ram, held, inter alia, that the wife by her actings, would have led a reasonable man to believe that she had given her husband a carte blanche to act on her behalf. His Lordship applied the doctrine of estoppel which is a flexible doctrine by which courts seek to do

essential justice between litigating parties: see *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 (FC).

[23] In *RHB-Cathay Securities Pte Ltd v Ibrahim Khan & other actions* [1999] 3 SLR 464, the defendants maintained share trading accounts with the plaintiff's dealer. The defendant had traded in their accounts through the dealer and incurred substantial contra trading losses. The defendants claimed that the trades in the accounts were unauthorised and were transacted by the dealer without their knowledge. The defendants were sent, inter alia, numerous contract notes and contra statements. The defendants did not dispute any of these trades until proceedings were commenced against them. The plaintiff averred that the defendants had full knowledge of all the trades and were estopped from denying them. Chan Seng Onn JC of the Singapore High Court allowed the plaintiff's claim, on the grounds, inter alia, that the defendants' stunning silence after receiving the contract notes and contra statements would constitute an estoppel at law which precluded their denial of the trades.

CONCLUSION

[24] On the foregoing grounds, we are of the unanimous view that the learned trial judge had arrived at a correct finding of facts and had rightly applied the law. We therefore dismissed the defendant's appeal with costs. We affirmed the entire judgment of the court below. Deposit to the plaintiff-respondent on account of taxed costs.

[25] My learned sister, Heliliah bte Mohd Yusof JCA has read this judgment in draft and has expressed her concurrence with it. My learned brother Abdul Malik bin Hj Ishak JCA has also agreed with my judgment in draft and has further indicated that His Lordship would write a separate supporting judgment.

Abdul Malik Ishak JCA:

INTRODUCTION

[26] I have read the judgment in draft of my learned brother Low Hop Bing JCA and I would like to add my own reasons for dismissing this appeal with costs and thereby affirming the entire judgment of the High Court.

[27] For convenience, I shall refer the parties in the same manner as they were referred to in the High Court. Thus, the appellant by the name of Yoong Sze Fatt will be referred to as the first defendant. While the respondent by the name of Pengkalen Securities Sdn Bhd will be referred to as the plaintiff. The

second defendant by the name of Dato' Wong Yeon Chai was not a party in this appeal.

TO THE HEART OF THE MATTER

[28] Essentially the plaintiff's claim was for the sum of RM2,927,621.70 calculated as at 28 February 1999 being contra losses and accrued interest that arose from share trading activities conducted by or on behalf of the first defendant by way of an individual account No 273077 ('trading account') that was opened by the second defendant in favour of the first defendant.

[29] The plaintiff as a stockbroking company and as a member of the Kuala Lumpur Stock Exchange carried on the business of stockbroking. The first defendant was the client of the plaintiff and had a trading account with the plaintiff.

[30] The first defendant had placed in his trading account a sum of RM2m so as to enable him to trade in shares and securities. It was this sum of RM2m that formed the counterclaim of the first defendant.

[31] The plaintiff succeeded in establishing its entitlement to its claim by proving the following set of facts:

(a) that the trading account was opened by the first defendant upon the terms as set out in the individual account opening form ('agreement');

(b) that trades were conducted on the trading account of the first defendant which had resulted in losses; and

(c) that the first defendant stood liable for the losses incurred on his trading account by virtue of those terms as set out in the agreement as well as his knowledge and consent pertaining to the trades conducted on his trading account.

[32] The terms and conditions relating to the trading account were binding on the first defendant because he agreed to be bound by it (*Chai Then Song v Malayan United Finance Bhd* [1993] MLJU 128; [1993] 2 CLJ 640; and *Sarawak Securities Sdn Bhd v Andy Chan Chiaw Guan; Fabian Eh Ng (third party)* [2000] 7 CLJ 364). Inter alia, the material terms and conditions that have been agreed to by the first defendant upon signing the agreement may be stated as follows (see p 256 of the appeal record):

(a) by cl 6 of the agreement, the first defendant undertook to make immediate payment for delivery of securities purchased *on his behalf*;

(b) by cl 9 of the agreement, the first defendant authorised the plaintiff to

sell out or buy in securities as may be required to clear the first defendant's position and, once again, the first defendant undertook to indemnify the plaintiff against all losses; and

(c) by cl 11 of the agreement, the first defendant agreed to pay all charges and interest rates imposed by the plaintiff at the plaintiff's discretion.

[33] Evidence was led to show that transactions were conducted on the trading account which led to an overall loss on the said account. This fact was established through the evidence of Chua Yew Leong ('PW1') and the contract notes that were tendered showed that trades were indeed conducted. It must be borne in mind that this piece of evidence went unchallenged because there was no cross-examination of Chua Yew Leong ('PW1') and, consequently, it must be taken to be admitted by the first defendant (*Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 at p 400).

[34] The first defendant's answer to the plaintiff's claim was rather simple. That he was not the one who instructed those trades that resulted in the losses and that the second defendant, who was not a party in this appeal, was said not to have been authorised by the first defendant to trade on his (first defendant's) behalf.

[35] Unfortunately, the first defendant elected not to testify and neither has he led any evidence to support his wild assertions.

[36] There was evidence emanating from Leong Bik Ngan ('PW2') to show that the first defendant knew or ought to have known that his trading account was being traded upon. That evidence would be as follows:

(a) the contract notes and the contra statements were sent to the first defendant's home address;

(b) the first defendant remained silent and did not complain to the plaintiff that his trading account was being utilised for trades or that the contract notes which were sent to him were not his transaction; and

(c) the letter of demand dated 28 November 1997 was sent to the first defendant at his home address, yet the first defendant did not contact the plaintiff to dispute the plaintiff's letter of demand.

[37] Having failed to protest to the transactions or usage of his trading account, the first defendant must now be estopped from denying the losses arising from the trades conducted on his trading account. According to the case of *Peyman v Lanjani & Ors* [1985] 1 Ch 457; [1984] 3 All ER 703 (CA), a party will not be held to be estopped unless his conduct is unequivocal. Thus, in *Herman v Royal Exchange Shipping Co and Patton, Jr & Co* (1884)

C & E 413, the court held that after accepting freight on goods shipped under bills of lading in their printed forms, certain persons were estopped from saying that the ship was not theirs, that the master was not their agent and that the contract was not with them. In *Gwyther v Boslymon Quarries Ltd* [1950] 2 KB 59; [1950] 1 All ER 384, a person entitled to payments from which the payer had wrongfully deducted tax, without objection from the payee was estopped from demanding payment of the amount of tax wrongfully deducted for which the payer had accounted to the Inland Revenue. In *Thomas v Brown* (1875–76) 1 QBD 714 at p 722, a party was estopped by conduct when investigating title from denying the existence of the contract. In *Else v Barnard* (1860) 28 Beav 228, a purchaser was estopped from objecting that the sale was not by auction. In *Wright v John Bagnall & Sons Ltd* [1900] 2 QB 240 (CA) an employer who admitted statutory liability to pay compensation was estopped from raising the defence that the claim was not brought within the prescribed time. In *Burgoyne & Co Ld and PB Burgoyne v AH Godfree & Co* (1904) 22 RPC 168 (CA), the conduct of a shipper in selling wine branded with his name prevented him from complaining of the act of a purchaser in selling it as the shipper's wine. In *Jackson v Knutsford Urban District Council* [1914] 2 Ch 686 at p 696, after having entered into a bargain by which they agreed not to object to part of a building being treated as an obstruction, the plaintiffs were estopped from alleging that no part of the building was an obstructive building. In *Yorkshire Insurance Company Ltd & Ors v Craine* [1922] 2 AC 541 (PC), insurers, taking possession under a salvage clause in a fire insurance policy, were estopped from relying on non-fulfilment of the requirements of an independent condition as to delivery of particulars of the claim. In *Dunn v Shanks* [1932] NI 66 (CA), the former owner of a business who had omitted to give notice of the transfer of the business and continued to attend to it was estopped from denying that he was the owner. In *Hopgood v Brown* [1955] 1 All ER 550 at p 559; [1955] 1 WLR 213 at p 223 (CA), the successor in title of a landowner who permitted an adjoining owner to encroach over a boundary with a permanent erection was estopped from claiming damages in respect of such encroachment.

[38] The law journals are replete with authorities on estoppel by conduct. It must be emphasised that parties to litigation who have continued the proceedings with knowledge of an irregularity of which they might have availed themselves are definitely estopped from afterwards setting it up (*Oakland Metal Co Ltd v D Benaim & Co Ltd* [1953] 2 QB 261; [1953] 2 All ER 650; *Toronto Railway Co v Corp of the City of Toronto* [1904] AC 809 at p 815 (PC); *Thomas Tyerman v Sarah Smith* (1856) 6 El & Bl 719; *Fortunatus Edmund Andrews v John Elliott* (1855) 5 El & Bl 502, affirmed in (1856) 6 E & B 338, Ex Ch; *Shrager v Basil Dighton Ltd & Ors* [1924] 1 KB 274 (CA); and *Oakland Metal Co Ltd v D Benaim & Co Ltd* [1953] 2 QB 261; [1953] 2 All ER 650).

[39] Now, with the failure of the first defendant to testify or to lead any evidence, the probability of the case falls in favour of the plaintiff. The first defendant had either:

(a) instructed the trades; or

(b) had given authority to the second defendant to trade on his behalf; or

(c) willingly consented to his trading account to be utilised by the second defendant; or

(d) did not monitor his trading account and merely disputed the contract notes and the contra statements that were sent to him.

[40] It must be borne in mind that the contract notes and the contra statements which were produced before the High Court were not challenged nor disputed by the first defendant. That being the case, it would be appropriate to hold that the first defendant had in fact accepted the losses incurred on the trading account in its entirety (*Sivalingam a/l Periasamy v Periasamy & Anor*).

[41] Having considered the arguments of counsel on both sides and the authorities cited by them, I am of the opinion that the following guidelines may be taken as well settled. At the close of the plaintiff's case, the first defendant chose to submit that there was no case to answer and preferred not to call witnesses. It was a perilous course to take simply because all the evidence adduced by the plaintiff must be presumed to be correct. It is a sound general rule that a judge should not consider a submission of no case to answer unless the defendant (here the first defendant) agrees not to call any evidence, whatever the outcome of the submission. Thus, where a defendant is put to his election and elects not to call evidence, just like the present appeal, the result is this. That the trial is in effect truncated and the question for the judge to consider is whether the plaintiff has established his case by the evidence called on the balance of probabilities. If the plaintiff has done so, then the judgment should be given to the plaintiff. If the plaintiff has not done so, then the judgment should be given to the defendant. If the judge chooses the latter course of action and give judgment to the defendant, the judge may indeed be of the view that there is no case for the defendant to answer. But such a judgment should not be given unless the judge finds that the plaintiff has not established his case by the evidence adduced on the balance of probabilities.

[42] I shall now refer to the case of *Benham Ltd v Kythira Investments Ltd & Anor* [2003] EWCA Civ 1794; [2004] CP Rep 17 (CA) (Civ Div). The facts may be stated as follows. A property company (D) retained estate agents (C). C summarily dismissed one of their senior employees (X) on the ground

that he took a secret profit on a particular transaction involving D. C brought a claim against D for commission for that transaction. D denied C's principal allegations. C's claim was weakened by the facts that (i) no agency agreement in writing for the transaction existed, and (ii) for obvious reasons, C were unable to call X as a witness. At the close of C's evidence, D submitted that there was no case to answer. The judge ruled that (a) this was an exceptional case in which it was appropriate to rule on the submission without putting D to elect not to call evidence, and (b) the judge acceded to D's submission and (c) consequently, dismissed C's claim with costs.

[43] The Court of Appeal allowed C's claim. In answering the question of in what exceptional circumstances may or should a judge consider a submission of no case without putting the defendant to his election? The Court of Appeal held (a) rarely, if ever, should a judge trying a civil action entertain a defendant's submission of no case to answer without requiring the defendant to elect not to call evidence, and (b) this was not an exceptional case because the judge was wrong to conclude that nothing in D's evidence would affect the view taken of C's case because the judge should have recognised that were their submissions were to fail, then D might (i) call evidence that would prove helpful to C's case, or (ii) fail to call witnesses who might be expected to have material evidence thereby enabling the court to draw inferences in C's favour (*Wisniewski v Central Manchester Health Authority* [1998] Lloyd's Rep Med 223 (CA)).

[44] In dealing with a submission of no case to answer, what test should the judge apply? The Court of Appeal in the *Benham*'s case said that the test was whether or not on the evidence adduced by the plaintiff, the plaintiff has *a real prospect of success*. However, the Court of Appeal conceded that what is meant by that test is not as clear as it might be. Simon Brown LJ explained that where D's witnesses clearly have material evidence to give on the critical issue in the action the test of whether C has 'a real prospect of success' may be reformulated as 'have the claimants (plaintiffs) advanced a prima facie case to answer, a scintilla of evidence in support of the inference for which they contend, sufficient to call for an explanation from the defendant?' His Lordship added that the fact that C's case may be a weak case and unlikely to succeed unless assisted, rather than contradicted, by D's evidence, or by adverse inferences to be drawn from D's not calling any evidence, would not allow it to be dismissed on a no case submission. The Court of Appeal concluded that it was apparent that the judge had approached the question by asking whether or not C had established their case on a balance of probabilities and in the circumstances had clearly applied the wrong test.

[45] Back home, on the subject of the submission of no case to answer we have the classic case of *Subry bin Hamid v Husaini bin Tan Sri Ikhwan & Anor*

[2006] 6 MLJ 229 (CA), which also made reference to the *Benham*'s case. My learned brother Low Hop Bing JCA also referred to *Subry bin Hamid* in his well written judgment.

[46] Suffice for me to say that when a submission of no case to answer has been made and coupled with the submission that no witnesses will be called, it gives rise to these unrebuttable implications:

(a) the outcome to the question of whether there is a case to answer would be that all evidence led by the plaintiff must be presumed to be correct; and

(b) so the burden falls on the first defendant to call evidence to rebut the plaintiff's case and the first defendant's failure to do so in the absence of reasonable explanation will trigger an adverse inference to be drawn against the first defendant under s 114(g) of the Evidence Act 1950.

[47] As against the plaintiff's pleaded case, the first defendant's pleaded case was generally one of unsubstantiated denials coupled with a counterclaim for the refund of the deposit monies to the tune of RM2m. Since the evidence led by the plaintiff must be presumed to be true, the plaintiff has therefore satisfied the requirements under s 101 of the Evidence Act 1950. It therefore falls on the first defendant to prove his defence under s 101 of the Evidence Act 1950. The first defendant too has to introduce such evidence as is necessary to discharge that burden under ss 102 and 103 of the Evidence Act 1950. As I said earlier, the first defendant chose a perilous course of action and his failure to call evidence would result in an appropriate adverse inference to be drawn against him. Thus, the allegations by the first defendant that there were other sets of account opening forms were nothing more than a mere fabrication. And it must be held that the first defendant had consented to or otherwise permitted the second defendant to utilise his trading account to trade in securities which ultimately result in contra losses which are now the subject matter of the plaintiff's claim. It must also be held that the relevant documents marked as exhs 'P1', 'P2' and 'P18' were indeed executed by the first defendant. And that the relevant contract notes, contra statements and statements of accounts were indeed sent by the plaintiff and received by the first defendant and no one else.

[48] It must be emphasised that the first defendant produced a purported handwriting expert's report and tendered peculiarly through the first defendant's trial counsel to prove the first defendant's contention that he did not sign the account opening form.

[49] Anuar CJ Malaya in *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61 at p 85 referred to the Supreme Court of India's decision in *Murarilal v State of MP* AIR 1980 SC 531 at p 534 which carried the following passages:

> But, the hazard in accepting the opinion of any expert, handwriting expert or any other kind of expert, is not because experts, in general, are unreliable witnesses — the equality of credibility or incredibility being one which an expert shares with all other witnesses — but because all human judgment is fallible and an expert may go wrong because of some defect of observation, some error of premises or honest mistake of conclusion. The more developed and the more perfect a science, the less the chance of an incorrect opinion and the converse if the science is less developed and imperfect. The science of identification of fingerprints has attained near perfection and the risk of an incorrect opinion is practically non-existent. On the other hand, the science of identification of handwriting is not nearly so perfect and the risk is, therefore, higher.

[50] There is an article entitled *Sources of Error in Forensic Handwriting Evaluation* reported in the Journal of Forensic Sciences, Vol 40, No 1, January 1995 at p 78 which carries the following germane write ups:

> Handwriting examination is generally considered, by friends and critics alike, to be more subjective than the other crime laboratory specialties in that it relies more on experienced judgment than on quantifiable data. If we accept this premise, it would follow that it should be all the more important to adhere to agreed on principles so as to preserve the greatest degree of objectivity and, thereby, accuracy.
>
> Three particular problem areas seem to cause most of the errors in handwriting cases, whether they involve signatures, handwritten texts, or handprinting. They are (1) failure to properly evaluate differences; (2) failure to detect significant movement characteristics; and (3) the use of self-serving exemplars.

[51] In so far as handwriting is concerned, even lay witnesses who are familiar with the writing of the person in question may give evidence as to the identity of the writer (*Alfred Ernest Derrick* (1910) 5 Cr App R 162). Of course, evidence relating to handwriting by experts are most welcome although the form in which they give evidence will be different. According to the case of *The Queen v Silverlock* [1894] 2 QB 766 at p 771:

> ... the witness who is called upon to give evidence founded on a comparison of handwritings must be peritus; he must be skilled in doing so; but we cannot say that he must have become peritus in the way of his business or in any definite way. The question is, is he peritus? Is he skilled? Has he an adequate knowledge?

[52] It is the duty of the court to satisfy itself that the *expert* is indeed an expert specially qualified, armed with the necessary skill and experience and

has a vast knowledge in the field of enquiry carried out by him. The court would also want to know the duration of time the *expert* has engaged himself in his field of expertise and whether that is his only occupation and in which court he has testified. Generally, the court is interested to know the expert's background. The purpose is simply to show the competency of the expert. It is for these reasons that the expert will be asked about his general and technical education together with the special studies which he may have undertaken.

[53] Competency of the expert may be shown by drawing attention to the ways in which the expert has been recognised as an authority in his field. Thus, the expert may allude to the schools, associations and seminars where he has lectured and whether he has been bestowed with special honours or degrees by prominent universities. And publication of writings in recognised journals is also good evidence of the extent of the expert's competency. In short, the *expert* must be a qualified person.

[54] Lord Wilberforce in *Whitehouse v Jordan & Anor* [1981] 1 WLR 246 at pp 256H–257A aptly said:

> While some degree of consultation between experts and legal advisers is entirely proper, it is necessary that expert evidence presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation.

[55] Section 51 of the Evidence Act 1950 states that whenever the opinion of any living person is relevant, the grounds on which his opinion is based are also relevant. The courts have said, time and again, that a bare expression of opinion has no evidentiary value at all (*Sim Ah Song & Anor v Rex* [1951] MLJ 150; *Lai Yong Koon v Public Prosecutor* [1962] MLJ 327; and *Public Prosecutor v Yiau Swee Tung* [1999] 3 MLJ 353). Brown, acting CJ in *Sim Ah Song & Anor v Rex* at p 151 aptly said:

> The business of an expert witness is to draw upon the store of his knowledge and experience in order to explain some matter which his experience should qualify him to understand. He is quite entitled to express his opinion, which indeed is the natural corollary of his explanation. But a bare expression of his opinion has no evidential value at all. Unless he gives an explanation which supplies the understanding of the subject which the court lacks, the court is in no better position than it was before to determine the question which it is its duty to determine, and if the court acts upon a bare expression of the expert's opinion the determination of the question becomes that of the expert and not of the court.

[56] So, the court must be vigilant and must satisfy itself that the *expert* is indeed an expert specially qualified. Here, the *expert* report tendered by the

first defendant's trial counsel failed to comply with the simple preliminary requirements of establishing the *expert*'s qualifications and for this reason, it should be disregarded.

[57] To compound the matter further, the *expert* had passed away prior to the trial of the matter and his death had affected the admissibility of the *expert*'s report sought to be relied upon by the first defendant.

[58] As an opinion evidence, the expert must come to court to give evidence. Section 60(1)(d) of the Evidence Act 1950 states that direct oral evidence must be given in respect of the opinion of any person. Thus, in the absence of such direct evidence from the *expert* his report cannot in law be admissible as evidence. The lack of opportunity to cross-examine the *expert* on his report is another ground to disregard the *expert*'s report.

[59] The sample or specimen signatures mentioned in the *expert* report are certainly incapable of independent verification. These sample or specimen signatures have not been *admitted or proved to the satisfaction of the court* within meaning of s 73 of the Evidence Act 1950.

[60] The *expert* report suggests that the sample or specimen signatures relied upon by the *expert* were provided by the first defendant's solicitors and this would squarely fall into the category of *self-serving exemplars*.

[61] Given all these shortcomings, the High Court was not in a position to hold that the sample or specimen signatures relied upon by the *expert* were in fact that of the first defendant nor was the High Court in a position to satisfy itself, as required by law, and based on observation that it was *safe* to accept the opinion of the *expert* (*Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai*). The High Court had correctly disregarded the *expert* report.

[62] The allegation that the first defendant's signature on the agreement was forged was not considered by the High Court. It must be borne in mind that the allegation of forgery was not pleaded in the first defendant's defence. This allegation was merely *put* to the plaintiff's witness (see pp 43 and 97 of the appeal record). A perusal of the first defendant's defence especially at para 4 would show that the first defendant admitted opening the subject account but disputed utilising or authorising trades on the said account. Be that as it may, even if the first defendant's allegation of forgery were to be accepted, the first defendant still bears the burden of proving the same (see *EON Bank Bhd v Hotel Flamingo and another case* [2005] 1 MLJ 712 at p 722, the decision of my learned brother Low Hop Bing J (now JCA)). As demonstrated, the only evidence tendered by the first defendant to prove the alleged forgery by way of an *expert* report was inadmissible.

[63] The first defendant's counterclaim for the sum of RM2m was rightly rejected by the High Court. Since the first defendant led no positive evidence in support of his counterclaim, he cannot deny his earlier sworn statement made during interrogatories that he has no knowledge of the sum of RM2m (see pp 26 and 27 of the appeal record).

[64] Finally, I will now say something about the finding of facts by the High Court which has been alluded to by my learned brother Low Hop Bing JCA. An appellate court will not readily interfere with the finding of facts arrived at by the trial court. It is trite law that the primary task of evaluation of the evidence and the function of determining where the truth lies, on a balance of probabilities, is entrusted by law to the trial court. In this appeal to the High Court. And the appellant court is under a duty to intervene with the finding of facts by the trial court where the trial court has so fundamentally misdirected itself that a reasonable man may safely say that no reasonable court which had properly directed itself and asked the right questions would have arrived at the same conclusion (*Renal Link (KL) Sdn Bhd v Dato' Dr Harnam Singh* [1997] 2 MLJ 373 at p 379; [1997] 3 AMR 2430 (CA) at p 2440D–E*; Heller Factoring Sdn Bhd (previously known as Matang Factoring Sdn Bhd) v Metalco Industries (M) Sdn Bhd* [1995] 2 MLJ 153; [1995] 2 AMR 1353 (CA) at pp 171H–173A; *Associated Tractors Sdn Bhd v Woo Sai Wa* [1997] 5 MLJ 441 at p 450F–H; and *Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd* [2006] 3 MLJ 131; [2006] 3 AMR 410; [2006] 2 CLJ 337 (CA) at p 417, at para 18.

[65] The case of *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals* [2003] 1 MLJ 567; [2003] 2 AMR 6; [2003] 1 CLJ 585 (CA), sets out certain categories in which appellate interference may be warranted. It would be ideal to set out, briefly, instances where the finding of facts by the trial court was reversed by the appellate court:

(a) non-consideration or insufficient or no judicial appreciation of material evidence constitutes *insufficient judicial appreciation of relevant evidence* (*Asean Security Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 CLJ 1 (FC));

(b) where the audio visual advantage reserved to a trial judge had been missed or that the findings made by the trial judge do not accord well with the probabilities of the case (*Len Min Kong v United Malayan Banking Corp Bhd and another appeal* [1998] 2 MLJ 478 at p 486C–D; [1998] 3 AMR 2641 at p 2655; [1998] 2 CLJ 879 (CA); *Maju Holdings Sdn Bhd v Fortune Wealth (H-K) Ltd and other appeals* [2004] 4 MLJ 105; [2004] 6 AMR 319; [2004] 4 CLJ 282 (CA); and *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 6 AMR 781; [2004] 4 CLJ 309 (FC));

(c) where the facts were misapprehended and the wrong principles of law were blindly applied by the trial judge (*Lim Chor Ching & Anor v Idris bin Abdul Karim and anor appeal* [1998] 3 AMR 3182; [1998] 3 CLJ Supp 145 at p 156 a–g);

(d) where there was a failure to assess the evidence with the documents at hand and view it against the probabilities of the case (*Loo Hon Kong v Loo Kim Lim @ Loo Kim Leong* [2004] 4 AMR 591; [2004] 4 CLJ 1 (CA));

(e) where there was a failure to consider the relevancy of contemporaneous documents (*Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35 (SC) at p 37); and

(f) where the finding of facts was contrary to the documentary evidence (*Associated Tractors Sdn Bhd v Woo Sai Wa* at p 451C).

[66] In the present appeal, I see no reason to intervene or interfere with the finding of facts arrived at by the High Court.

[67] I am in total agreement with the views expressed by my learned brother Low Hop Bing JCA. For all these reasons, I now make those orders that were made by His Lordship.

[68] I too have shown this supporting judgment in draft to my learned brother Low Hop Bing JCA and His Lordship has kindly agreed with it.

Appeal dismissed with costs.

Reported by Kanesh Sundrum